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In the Supreme Court of the United States

OCTOBER TERM, 1947

NO. 156

JAMES YATES, *Petitioner*,

VS.

EDWARD BALL, *Respondent*.

BRIEF OF RESPONDENT

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida.

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RECORD PRESS INC.

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STATEMENT OF THE CASE

The judgment of the Florida Supreme Court (*Ball v. Yates*, 29 So. 2d, 729) which Petitioner seeks to have reviewed was the third appearance of the cause in the Florida Supreme Court.[1]

Upon the first trial, the Circuit Court of Duval County directed a verdict for the defendant (Respondent here) at the close of the plaintiff's case. Upon appeal, the Florida Supreme Court reversed, holding that the plaintiff's evidence *standing alone* made a prima facie case (and deciding certain other legal points not now relevant) *Yates v. Ball*, 132 Fla. 132, 181 So. 341.[2] Upon this decision, four Justices concurred, Chief Justice Ellis and Justice Buford dissenting.

Upon the second trial at the conclusion of the evidence of both parties, there was a verdict for the Petitioner. Upon appeal, the Florida Supreme Court again reversed, holding, "with the picture of the transaction now complete", that the evidence was insufficient as a matter of law to support a verdict for plaintiff,[3]

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[1] In his petition (Summary Statement pp. 4-6) and brief, (particularly in his parallel comparisons pp. 17 & 18) Petitioner misapprehends the contents and effect of the opinions of the Florida Supreme Court in the several appeals to that court in this cause. Therefore for the convenience of the Court we make a statement of the case.

[2] This suit is upon an alleged oral guaranty by Respondent of $125,000 second mortgage bonds held by Petitioner (subject to $600,000 first mortgage bonds). The mortgaged property was wild lands of dubious value, and the mortgagor was insolvent. The bonds and mortgages were made at the height of the 1925 Florida real estate boom; and the alleged oral guaranty thereof was three years later (R. 323, 4).

[3] On the second trial and the second appeal, and on the third trial and the third appeal, what made "the picture of the transaction *now complete*," as the Florida Supreme Court put it (in 145 Fla. 537, 200 So. 692) was uncontradicted written evidence which conclusively refuted (i) the alleged contract and (ii) ratification thereof.

Ball v. Yates, 145 Fla. 537, 200 So. 692. (See also *Ball v. Yates*, 29 So. 2d 729 text p. 733, Col. 1). This was a unanimous decision in which the whole Court concurred in holding that the complete evidence did not make a case for plaintiff.

Ordinarily that should have ended the case; but the plaintiff added certain amended counts to his declaration[4] and a new trial was had. Petitioner concedes (Bf. 16) that the evidence on the third trial was substantially the same as on the second trial which the Florida Supreme Court had theretofore unanimously held insufficient as a matter of law to support a verdict for the plaintiff. At the third trial the circuit Judge denied the defendant's motion for a directed verdict, made after all the evidence was in, and there was a verdict for plaintiff. The Florida Supreme Court again reversed, (*Ball v. Yates*, 29 So. 2d, 729), holding as follows:

> "We find that the trial court erred in not directing a verdict for the defendant after all the evidence was in".[5]

The grounds assigned by the Court for this holding are:

(1) That the evidence was insufficient as a matter of law to establish the alleged agency of Suttles;

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[4] In legal effect the amended counts were substantially the same as the original count, elaborated by voluminous evidentiary details all admissible under the original count. (R. 2-10; 87-107).

[5] Petitioner would brush aside the fact that on the first appeal, the *Petitioner's* evidence only was before the Court, whereas on the second and third appeals the evidence of both Petitioner and Respondent was in, and that with the "Picture of the transaction" complete, the evidence was held insufficient to support the verdict.

(2) That the evidence was insufficient as a matter of law to establish ratification by the defendant, Ball, of Suttles' representations;

(3) That the evidence was insufficient as a matter of law to establish an actionable promise by the defendant, Ball;

(4) That, under the doctrine of the law of the case, the third trial (likewise the third appeal) was ruled by the Florida Supreme Court's unanimous decision on the second appeal, holding that the evidence adduced was insufficient as a matter of law to support a verdict for the plaintiff;[6] and

(5) That the alleged promise of the defendant, Ball, was in contravention of the statute of frauds (Sec. 725.01, Florida Statutes 1941) and, therefore, unenforceable, being merely an oral promise to answer for the debt of another.[7]

The decision of the Florida Supreme Court concludes as follows:

> "Upon the going down of the mandate the lower court shall make inquiry of the counsel of record of the respective parties as to whether or not there will be evidence available on a further trial of this cause which would add substantially to the strength of the plaintiff's case. If it shall appear as the result of such inquiry that upon another trial the evidence to be ad-

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[6] This ground of the decision is completely ignored by the Petition and Supporting Brief.

[7] This ground of the decision is completely ignored by the Petition and Supporting Brief.

duced would be substantially the same as that submitted at the trial hereby reviewed, then and in that event, the trial court shall thereupon so adjudge and enter a judgment for the defendant.

"Reversed with directions."

The decision was rendered by the whole court sitting en banc. It was concurred in by Justices Barns, Buford, Thomas, Adams and Brown (since retired). Justices Chapman and Terrell dissented.

A petition for rehearing was filed by Petitioner, December 27, 1946 (R. 772-827).

On February 1, 1947, some sixty odd days following the rendition of the decision, Petitioner filed an ex parte suggestion of the disqualification of Justices Buford and Adams (R. 831-902). The essential facts of this petition are summarized in the argument of Point III, infra.

The two Justices whose disqualification was suggested withdrew, and on February 28, 1947, the remaining five Justices held unanimously that, "It is our conclusion and judgment that in fact and in law, it (the suggestion for disqualification) is inadequate and insufficient in substance" (29 So. 2d, 735) and that Justices Buford and Adams were not disqualified. Justices Terrell and Chapman, who had dissented on the court's prior decision on the merits of the case (29 So. 2d, 729, text p. 733) concurred in holding that Justices Buford and Adams were not disqualified.

On March 28, 1947, the Florida Supreme Court, Justices Barns, Thomas, Buford and Adams concur-

ring, Chapman and Terrell dissenting, denied Petitioner's petition for rehearing (29 So. 2d, text pp. 737-739).

Upon request of Petitioner (R. 829) the Florida Supreme Court has withheld issuing its mandate pending the action of this Court upon his petition herein.

POINT I.

This Court Should Not Take Jurisdiction Because the Judgment Sought to Be Reviewed Lacks the Requisite Finality

Section 237 of the Judicial Code, 28 U. S. C. 344, requires that a judgment of a state court be a "final judgment" in order that it may be reviewed by the Supreme Court of the United States.

The decisions of this Court uniformly hold that a judgment of the highest court of a state reversing an inferior court and remanding the case to the lower court for further proceedings consistent with the judgment of the appellate court, is not a "final judgment" within the meaning of Section 237 of the Judicial Code, and hence will not be reviewed by this Court.

The judgment to be appealable "must be the final word of a final court." *Market Street Railway Company v. Railroad Commission of California*, 324 U. S. 548 (1945).

There is, of course, the further rule that if the highest court of a state *itself* enters final judgment then this Court may review the same; also the cognate

rule that if the highest court of a state reverses an inferior court with directions to enter a specified judgment (without further hearing or proceedings) then this Court may review same.[8] But we are not concerned with those rules here, for in the case at bar the judgment of the Florida Supreme Court reverses and remands for a further hearing, the ultimate outcome of which (whether a further jury trial or a summary judgment) necessarily rests in future uncertainty, both in the circuit court and upon further appeals to the Florida Supreme Court.

The decision of the Florida Supreme Court sought to be reviewed (*Ball v. Yates*, 29 So. 2d, 729) puts forward five separate grounds for its decision (ante. pp. 2-3) and then concludes thus:

> "We find that the trial court erred in not directing a verdict for the defendant after all the evidence was in.

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[8] *Houston v. Moore*, 3 Wheat, 433, 4 L. Ed. 428; *County of St. Clair v. Lovingston*, et al., 85 U. S. 628, 21 L. Ed. 813; *Parcels v. Johnson*, 87 U. S. 653, 22 L. Ed. 410; *McComb v. County Commissioners of Knox County, Ohio*, 91 U. S. 1, 23 L. Ed. 185; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 27 L. Ed. 73; *Clark v. Kansas City*, 172 U S. 334, 43 L. Ed. 467; *Haseltine v. Central National Bank*, 183 U. S. 130, 46 L. Ed. 117; *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. Ed. 1000; *Coe v. Armour Fertilizer Works*, 237 U. S. 413, 59 L. Ed. 1027; *Market Street Railway Company v. Railroad Commission of California*, 324 U. S. 548, 89 L. Ed. 1171; *Gospel Army v. Los Angeles*, ... U. S. ...., 91 L. Ed. 1241, (decided June 9, 1947). If the matters left open on the remand by the highest state court are nothing more than "ministerial acts" with respect to which there is no possibility that the lower court may exercise judicial discretion, the judgment is final; if the lower court can exercise judicial discretion it is not final. *43 Col. L. Rev.* 1002 at 1013-1016, *Robertson & Kirkham*, Jurisdiction of the Supreme Court of the United States Sec. 32, 34 at pages 62 and 64; *Gospel Army v. Los Angeles supra* Compare *Atherton v. Fowler*, 91 U. S. 143, 23 L. Ed. 265; and *Mississippi C. Ry. Co. v. Smith*, 295 U. S. 718, 55 S. Ct. 830.

"Upon the going down of the mandate the lower court shall make inquiry of the counsel of record of the respective parties as to whether or not there will be evidence available on a further trial of this cause which would add substantially to the strength of the plaintiff's case. If it shall appear as the result of such inquiry that upon another trial the evidence to be adduced would be substantially the same as that submitted at the trial hereby reviewed, then and in that event, the trial court shall thereupon so adjudge and enter a judgment for the defendant.

"Reversed with directions."

It is, therefore, clear that no "final judgment" has yet been rendered in the case, as is required by Sec. 237 of the Judicial Code, and that this Court should not take jurisdiction.

It was, of course, competent for the Florida Supreme Court itself to have entered final judgment in the case, had it been so disposed (Sec. 59.34, Florida Statutes 1941, as amended Chapter 22, 854 Laws of Florida 1945). But it did not do so. Rather, it reversed the judgment with directions to the circuit court, upon the going down of the mandate, to hold a pre-trial conference[9] and determine whether or not upon a further trial of the cause there would be available new evidence which would add substantially to

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[9] Pre-trial conferences are authorized by Supreme Court Order of January 12, 1940, 141 Fla. 327; Order of Circuit Court of Duval County, June 20, 1940, Min. Bk 73, p. 462; see also *Hillsborough County v. Sutton*, 150 Fla. 601, 8 So. 2d, 401; *Bruce's Juices Inc. v. American Can Co.*, 155 Fla. 877, 22 So. 2d, 461.

the strength of plaintiff's case. The Florida Supreme Court further directed that if the circuit court should determine upon such pre-trial conference that the evidence to be adduced on a further trial would be substantially the same as that submitted at the trial reviewed, it should "so adjudge," and thereupon enter judgment for the defendant.

It is the settled Florida practice that upon reversal by the Supreme Court of a judgment in a common law case the plaintiff is ordinarily entitled to a new trial.[10]

It is likewise the settled Florida practice when a common law judgment has been reversed for insufficiency of the evidence to support the verdict that if on the re-trial the evidence is substantially as it was on the former trial, then it is the duty of the trial court to instruct a verdict for the defendant. *Jones v. Tampa Electric Co.*, 143 Fla. 693, 197 So. 385.

In the case at bar the Florida Supreme Court did not unqualifiedly remand the case for a re-trial before a jury, involving much time and expense; nor did it unqualifiedly reverse "with directions to dismiss the case" (as Petitioner mistakenly asserts in his second question (Pet. 3). Rather, it directed the employment of a pre-trial conference for preliminary determination by the circuit court whether or not upon a further trial there would be available new evidence (going beyond that adduced at the trial which was reviewed) sufficient to avoid the direction of a verdict for the defendant.

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[10] *Webb Furniture Co. v. Everett*, 105 Fla. 292, 141 So. 115; *Pritchett v. Brevard Naval Stores Co.*, 134 Fla. 649, 185 So. 134; *Weis-Fricker Mahogany Co. v. King*, 139 Fla. 539, 190 So. 880; *Jones v. Tampa Electric Co.*, 143 Fla. 693, 197 So. 385.

The legal effect of new evidence is a question of law appropriate for determination by the judge. If the circuit judge at the pre-trial conference finds new evidence available to make a prima facie case, he will order a fourth jury trial; otherwise he will adjudge such new evidence insufficient and enter judgment for defendant without uselessly empannelling a jury.

Non constat the plaintiff may again try his case before a common law jury (even without the intervention of this Court) unless he should fail to convince the circuit court at the pre-trial conference ordered by the Florida Supreme Court (29 So. 2d 733) that he can produce further evidence which will add substantially to the case that he made on the last trial.

Moreover, if plaintiff's showing on the impending pre-trial conference is adjudged by the circuit court to be insufficient to warrant a new jury trial, then plaintiff will, of course, be entitled to a further appeal to the Florida Supreme Court to determine the propriety of that judgment of the circuit court.

In his petition for rehearing in the Florida Supreme Court (R. 772-827) Petitioner threatens (R. 823-825) to question further in the circuit court the effectiveness (under the Florida Constitution) of the Florida Supreme Court's recent decision. Obviously the litigation in the state courts is not yet at an end, for if the circuit court should ultimately enter a judgment for the defendant, then the question of the constitutional power of the circuit court to enter such judgment can and may be raised for further determination by the Florida Supreme Court.

As long as Petitioner continues to protest the power of the circuit court (under the state constitution) to enforce the directions of the Florida Supreme Court's decision, he continues to confess that there is as yet no final judgment for review by this Court.

If, however, Petitioner had stipulated of record in the lower court that he had no new evidence to offer at a further trial, then the decision of the Florida Supreme Court would thereupon have *become* a final judgment. But since Petitioner still denies the power of the Florida Supreme Court under the Florida Constitution to make its aforesaid order and the power of the circuit court to enforce same upon further proceedings, there is as yet no final judgment, because further state court proceedings are still required to settle that question. *Mississippi C. R. Co. v. Smith*, 295 U. S. 718, 79 L. Ed. 1673; *Great Northern R. Co. v. Galbreath C. Co.*, 264 U. S. 571, 68 L. Ed. 855.

Even if this Court now takes jurisdiction and affirms the decision of the Florida Supreme Court, the plaintiff may still have a new trial of this case by making a showing at the impending pre-trial conference of the availability of substantial new evidence.

In other words, an affirmance by this Court will not necessarily end the case. What Petitioner really seeks here is a "piecemeal" review by this Court of litigation pending in the Florida courts.[11]

We submit that the judgment lacks the requisite finality to warrant review by this Court under Sec.

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[11] *Louisiana N. Co. v. Oyster Com.*, 226 U. S. 99 (101), 57 L. Ed. 138 (140).

237 of the Judicial Code. There is no "final word of a final Court," *Market Street Railway Co. v. Railroad Commission*, (supra).

POINT II.

This Court Should Not Take Jurisdiction Upon Petitioners Asserted Ground That the Judgment Sought to Be Reviewed Denies Right of Trial by Jury in Contravention of the Federal Constitution.

Petitioner urges as his second ground for the allowance of certiorari that the right of trial by jury embodied in the 7th Amendment is applicable to state courts by virtue of the 14th Amendment, and that in the case at bar the Supreme Court of Florida unconstitutionally denied Petitioner a trial by jury. Petitioner concedes that this Court has never specifically held that the right of trial by jury embodied in the 7th Amendment is applicable to state courts by virtue of the 14th Amendment. But he urges that such a thesis should now be considered and determined and that this case affords the opportunity.

It is sufficient answer to say:

(1) That numerous decisions of this Court are determinative of the constitutional point adversely to Petitioner;

(2) That the decision of the Florida Supreme Court did not deny Petitioner a trial by jury;

(3) And that the decision of the Florida Supreme Court is based upon independent, adequate,

non-federal grounds, thus rendering the constitutional issue, tendered by Petitioner, a moot question.

A. Numerous Decisions of This Court Are Adverse to Petitioner's Contention That the Federal Constitution Assures to a State Court Litigant a Right of Trial by Jury in Common Law Cases.

(1) This Court has held that a state court litigant is not entitled to a jury trial, under the 7th Amendment. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *Minneapolis v. Bombolis*, 241 U. S. 211, 60 L. Ed. 961.

In recent decisions this Court has reiterated its earlier holdings with approval. *Palko v. Connecticut*, 302 U. S. 319, 82 L. Ed. 288; *Malinski v. New York*, 324 U. S. 401, 89 L. Ed. 1029 (concurring opinion of Mr. Justice Frankfurter); *Fay v. New York & Bove v. New York*, —— U. S. ——, (decided June 23, 1947). 91 L. Ed. 1517.

(2) This Court has likewise repeatedly held that a state court litigant is not entitled to a jury trial, under the 14th Amendment. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678; *New York, etc. v. White*, 243 U. S. 188, 61 L. Ed. 667; *Wagner, etc. v. Lyndon*, 262 U. S. 226, 67 L. Ed. 961; *Southern R. Company v. Durham*, 266 U. S. 178, 69 L. Ed. 231; *Hardware, etc. v. Glidden Co.*, 284 U. S. 151, 76 L. Ed. 214.

(3) In analogous situations this Court has further held that neither (i) the double jeopardy clause nor (ii) the self-incrimination clause of the 5th Amendment is absorbed into the 14th Amendment. *Palko v.*

Connecticut, 302 U. S. 319, 82 L. Ed. 288; *Adamson v. People*, ——U. S. —— (decided June 23, 1947), 91 L. Ed. 1464; and also that the jury trial provision of the 6th Amendment is not "picked up" by the 14th Amendment. *Fay v. New York & Bove v. New York*, ——U. S. ——, (decided June 23, 1947). 91 L. Ed. 1517.

This Court's rejection of the thesis of absorption into the 14th Amendment of the three clauses of the 5th and 6th Amendments mentioned above is most convincing authority against Petitioner's thesis that the 7th Amendment is absorbed into the 14th. This is most especially so in the light of the decisions cited in paragraphs (1) and (2) immediately above.

B. The Decision of the Florida Supreme Court Did Not Deny Petitioner a Trial by Jury.

Petitioner's second question (Pet. 3) contains two assertions at variance with the record. His statement of his second "Question Presented" would lead the reader to believe that the "evidence" was the same on all three trials. That is incorrect. His statement of his second "Question Presented" also indicates that the Florida Supreme Court on the third and last appeal reversed a judgment in plaintiff's favor "with directions to dismiss the case". That is also incorrect.

The record discloses that the precise situation is this:

On the first trial, the circuit court directed a verdict for defendant on plaintiff's evidence standing alone. Plaintiff appealed and the Florida Supreme Court reversed, holding, inter alia, that plaintiff's

evidence standing alone made a prima facie case. *Yates v. Ball*, 132 Fla. 132, 181 So. 341.

On the second trial there was a jury verdict for plaintiff. Defendant appealed and the Florida Supreme Court again reversed, holding unanimously that the evidence as an entirety (Respondent's as well as Petitioner's, then before the Court for the first time) was, as a matter of law, insufficient to support plaintiff's verdict. *Ball v. Yates*, 145 Fla. 537, 200 So. 692. (See also *Ball v. Yates*, 29 So. 2d, 729, text col. 1, p. 733).[12]

On the third and last trial the circuit court again declined to direct a verdict for defendant and submitted the case to the jury. The verdict was for plaintiff and defendant again appealed. The Florida Supreme Court again reversed, (*Ball v. Yates*, 29 So. 2d 729) holding as follows:

> "That the trial court erred in not directing a verdict for the defendant after all the evidence was in."

The five grounds put forward by the Florida Supreme Court (set forth, ante pp. 2-3) may be summarized by saying that the Court determined that there was no issue of fact to go to the jury.

It is, therefore, not true that the Florida Supreme Court held that "evidence was sufficient to permit a case to go to the jury" and that juries twice returned

[12] At p. 4 of his petition, and at p. 16 of his brief, Petitioner asserts that on the second trial of this case this Respondent's evidence consisted "principally of denial of authority of his agent". That is incorrect, as the record (R. pp. 447-647) and the defendant's Exhibits (A to N inclusive) plainly show.

verdicts for petitioner on *that evidence.* The subsequent verdicts returned for petitioner were on *different* evidence from that which the Florida Supreme Court, on the first appeal, had held to make a prima facie case.[13] See *Ball v. Yates*, 145 Fla. 537, 200 So. 692, and *Ball v. Yates*, 29 So. 2d, 729, text col. 2, p. 733. Moreover, the evidence submitted on the last two trials has both times been held by the Florida Supreme Court to be legally insufficient to make a case for the plaintiff. The first decision against Petitioner was unanimous, *Ball v. Yates*, 145 Fla. 537, 200 So. 692; and the second decision against Petitioner, *Ball v. Yates*, 29 So. 2d, 729, was five to two against him.

In the second place, the Florida Supreme Court did not in its decision now sought to be reviewed, reverse the lower court "with directions to dismiss the case," as petitioner mistakenly asserts.

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[13] Suppose, however, that the evidence had been the same on all three trials and appeals (as Petitioner mistakenly asserts) and that on the second appeal (and also the third appeal) the Florida Supreme Court had taken a different view of the evidence from that taken by it on the first appeal, that thereby the Florida Supreme Court failed to adhere to the law of the case laid down on the first appeal. Still no federal constitutional question arises, for no provision of the federal constitution precludes a state court from modifying its prior action while a case remains pending. *King v. West Virginia*, 216 U. S. 92, 54 L. Ed. 396; *Moss v. Romey*, 239 U. S. 538, 60 L. Ed. 425; *Lewers & Cooke v. Atcherly*, 222 U. S. 285, 56 L. Ed. 202; *Messinger v. Anderson*, 225 U. S. 436, 56 L. Ed. 1152. By the same token state courts may overrule prior decisions without violation of the Federal Constitution. *Backus v. Fort Street Union Depot*, 169 U. S. 557, 42 L. Ed. 853; *Patterson v. Colorado*, 205 U. S. 454, 51 L. Ed. 879; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 68 L. Ed. 382. And finally, erroneous decisions by state courts of state law are held not to contravene the due process clause of the 14th Amendment. *Bonner v. Gorman*, 213 U. S. 86, 53 L. Ed. 709; *American Railway Express Co. v. Kentucky*, 273 U. S. 269, 71 L. Ed. 639; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. Ed. 91; *Arrowsmith v. Harmoning*, 118 U. S. 194, 30 L. Ed. 243; *Standard Oil Co. v. Missouri*, 224 U. S. 270, 56 L. Ed. 760.

On the contrary, the Florida Supreme Court reversed with directions to the circuit court to hold a pre-trial conference and ascertain if upon a further trial there would be any new evidence available which "would add substantially to the strength of plaintiff's case," and if not, then to "so adjudge and enter a judgment for the defendant," but if new evidence should be found to be available for plaintiff upon the pre-trial conference which would add substantially to plaintiff's case, then, of course, a jury trial should follow.

On the second appeal (*Ball v. Yates*, 145 Fla. 537, 200 So. 692) and again on the third appeal (*Ball v. Yates*, 29 So. 2d, 729) the Florida Supreme Court held that, as a matter of law, the evidence was insufficient to support a verdict for plaintiff. It had power, under the Florida Statute, thereupon to enter judgment for defendant. But it did not do so; instead it gave plaintiff another chance, a chance to make a showing before the trial court that he could prove his case by new evidence. It directed the employment of the modern device of a pre-trial conference, appropriately specifying that if at such pre-trial conference it was ascertained and determined that plaintiff could not muster substantial new evidence in proof of his case, then and in that event judgment should be entered for defendant.

It is thus clear that the Florida Supreme Court did not deny Petitioner a right of trial by jury. He had two jury trials (the second and third trials) and the Florida Supreme Court held that the evidence at both trials was insufficient as a matter of law to establish a case for plaintiff. The Florida Supreme Court

has generously afforded him the opportunity for still another jury trial, if at the impending pre-trial conference he shows that he has substantial new evidence which will tend to prove his case.

C. The Judgment Sought to Be Reviewed Is Based Upon Independent, Adequate, Non-Federal Grounds.

The decision of the Florida Supreme Court, which Petitioner seeks to have reviewed (*Ball v. Yates*, 29 So. 2d, 729) is based on three independent, adequate, non-federal grounds.

The decision in question reversed plaintiff's judgment because the Court found:

(1) That the evidence, as a matter of law, failed to make a case to go to the jury, for three reasons, viz.:

(a) The evidence was legally insufficient to establish the alleged agency of Suttles;

(b) The evidence was legally insufficient to establish ratification of Suttles' conduct by defendant, Ball; and

(c) The evidence was legally insufficient to establish an actionable promise by Ball;

And accordingly the Florida Supreme Court concluded: "the trial court erred in not directing a verdict for the defendant after all of the evidence was in".

(2) That the "law of the case" determined on

the second appeal, *Ball v. Yates*, 145 Fla. 537, 200 So. 692, (to the effect that the same evidence would not support a verdict for plaintiff) ruled the third trial and third appeal, and that, therefore, the trial court should have directed a verdict for defendant, and

(3) That the alleged promise was in contravention of the Florida Statute of Frauds (Sec. 725.01, F.S. 1941) and, therefore, unenforceable, and accordingly for a third reason the trial court should have directed a verdict for defendant.

Whether or not a case falls within the state statute of frauds, and is therefore unenforceable, is a pure legal question, a legal question of state law. The same thing is true of the sufficiency of the evidence, as a matter of state law, to make a case. That is a question of state law for the exclusive determination by the state court on a motion for directed verdict. No federal ground is involved.[14]

Thus the case at bar was decided on three independent, adequate, non-federal grounds, involving points of local state law, and accordingly the constitutional question raised of the right to trial by jury is unnecessary to be decided.

The principle, that if a state court judgment is based upon an adequate, independent, non-federal ground, that fact renders the decision of a federal con-

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[14] Of course, in cases arising under an Act of Congress, the question of the legal sufficiency of evidence to support a verdict does involve a federal question. The cases cited by Petitioner (Bf. pp. 22-23) are of this type; but those cases are not in point here.

stitutional question by this Court unnecessary, is so well settled as hardly to call for citation of the cases.[15]

It is, therefore, respectfully urged that this Court should not take jurisdiction because:

(1) Numerous decisions of this Court are determinative of Petitioner's constitutional thesis, adverse to his contention;

(2) The decision sought to be reviewed did not deny Petitioner a trial by jury; and

(3) The decision sought to be reviewed is based upon three independent, adequate, non-federal grounds, viz., the determination of three points of Florida law.

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[15] The following illustrative decisions will suffice: *Wood v. Chesborough*, 228 U. S. 672, 57 L. Ed. 1018; *Chapman v. Crane*, 123 U. S. 540, 31 L. Ed. 235; *Dibble v. Bellingham Bay Land Co.*, 163 U. S. 63, 41 L. Ed. 72; *Capital Endowment Co. v. Bowen*, 296 U. S. 546, 80 L. Ed. 387; *Ex parte Steckles*, 292 U. S. 610, 78 L. Ed. 1470; *Murdock v. Mayor*, 20 Wall. 590, 22 L. Ed. 429; *Hale v. Akers*, 132 U. S. 554, 33 L. Ed. 442; *Hammond v. Johnston*, 142 U. S. 73, 35 L. Ed. 941; *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111; *Berea College v. Kentucky*, 211 U. S. 45, 53 L. Ed. 81; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468, 56 L. Ed. 510; *Petrie v. Nampa & M. I. D.*, 248 U. S. 154, 63 L. Ed. 178; *Enterprise Dist. v. Farmers M. C. Co.*, 243 U. S. 157, 61 L. Ed. 644; *People v. Atwell*, 261 U. S. 590, 67 L. Ed. 814; *Mellon Co. v. McCafferty*, 239 U. S. 134, 60 L. Ed. 181; *McCoy v. Shaw*, 277 U. S. 302, 72 L. Ed. 891.

POINT III.

This Court Should Not Take Jurisdiction Because the Participation of Justices Buford and Adams in the Decision of the Case Did Not deny Petitioner Due Process of Law in Violation of the Fourteenth Amendment.

Petitioner has presented two grounds for the allowance of certiorari. One is that he was unconstitutionally denied a jury trial in contravention of the 14th Amendment by the decision of the Florida Supreme Court. That has been answered in the preceding Point. It now remains to answer his other Point, which is that two of the seven Justices of the Florida Supreme Court participating in the last decision of the case were disqualified for bias, and that accordingly the Court's decision against him by a majority of the remaining five Justices deprived him of due process of law under the 14th Amendment.

Petitioner concedes, (Bf. p. 15) that the case does not involve corruption, necessarily so, for nothing in the record discloses anything of the sort. He likewise concedes the "honesty" of the two justices and "their desire to mete even-handed justice" (Bf. p. 15).

Nor has Petitioner suggested that either of the two Justices whose impartiality is questioned has any interest of any kind, proximate or remote, direct or indirect, in the outcome of the controversy between the plaintiff, Yates, and the defendant, Ball.

The gravamen of Petitioner's imputation is that "financial transactions with the litigant's successful adversary" by two of the seven Justices, so affected

their "impartiality", as to deprive the Court's decision against him (by a majority of the other five Justices) of due process of law (Pet. 3). Even this charge in the petition (pp. 3 and 7) and brief (p. 14) is at variance with the record. The record does *not* show that either of the two Justices has ever engaged in financial transactions with the Respondent Ball.

Petitioner's Suggestion of Disqualification (R. 831-902) shows:

(1) That Respondent, Ball, is one of the four trustees of the Alfred I. duPont estate.[16]

(2) That the duPont estate (of which Ball is one of the four trustees) owns and controls a group of eighteen banks, including the Florida National Bank of Jacksonville and the Florida Bank at Fort Pierce, and also the St. Joe Paper Company.[17]

(3) That Ball is one of the twenty-one directors of the Florida National Bank of Jacksonville (R. 856) and is president of St. Joe Paper Company, but that Ball is not an officer of the Florida National Bank of Jacksonville (R. 856) and is neither an officer nor a director of the Florida Bank of Fort Pierce (R. 874).

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[16] The bare opinion of the affiant is advanced (R. 833) that Ball "is the dominating and controlling trustee". But that assertion is wholly unsupported by any factual averment, or any showing of the powers and duties of the respective trustees. And it is nowhere asserted that the Respondent, Ball, has any personal or financial interest, directly or indirectly in the trust assets or income.

[17] It is nowhere asserted that the Respondent, Ball, has any personal or financial interest, directly or indirectly in the Florida National Bank of Jacksonville, The Florida Bank at Fort Pierce or the St. Joe Paper Company.

(4) That in April 1944, St. Joe Paper Company made an oil lease to Justice Buford.[18] Ball signed it jointly with another corporate officer on behalf of the Company. This lease has been a matter of public record since August, 1944 (R. 887).[19]

(5) That on June 29, 1945, Justice Adams and his wife borrowed $80,000.00 from the Florida National Bank of Jacksonville[20] and gave a mortgage securing it, covering more than 22,000 acres of land, 200 head of Hereford cattle, and a large amount of automotive and farm equipment (R. 887-893). This mortgage has been a matter of public record since July 3, 1945 (R. 842, 843). The mortgage was paid off and satisfied of record January 10, 1946, (R. 843 and 940), approximately ten months before the case was argued and submitted in the Florida Supreme Court.

(6) That on December 4, 1946, after the Florida Supreme Court's decision had been rendered, Justice Adams and Irlo Bronson borrowed $30,000.00 from the Florida Bank at Fort Pierce and gave as security a mortgage covering improved property. The buildings on the property were required by the mortgage

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[18] The case was not tried in the Circuit Court until nearly a year afterward (R. 168). Justice Buford's acknowledgment on the assignment (R. 930) of this oil lease was taken by the Clerk of the Supreme Court of Florida.

[19] It was charged in the Suggestion of Disqualification (R. 839) "upon information and belief" that, during the pendency of the second appeal in this case, Ball had employed an attorney by the name of Harry Wells, said to be an intimate friend of Justice Buford. It was not charged that Wells had anything to do with this case. What service, if any, Wells performed for Ball, was not stated, but this much Petitioner concedes: That upon taking the appeal Ball did not employ an intimate friend of one of the Justices to appear as counsel of record in the case upon the appeal.

[20] Motion for new trial of the case was then pending undecided in the Circuit Court.

to be insured for $30,000.00, the entire amount of the mortgage (R. 900). This mortgage has been a matter of public record since December 10, 1946 (R. 844-901).[21] The mortgage is not yet due (R. 940).[22]

These facts disclose three legitimate business transactions (at all times, matters of public record), the one, a lease to Justice Buford from St. Joe Paper Company, the other, two mortgage loans made by two banks to Justice Adams, et al.[23] Petitioner does not question their legality (R. 844-5). However, when Petitioner characterizes them (Pet. pp. 3 and 7) as "financial transactions with the litigant", his statement is unwarranted. The record shows no transactions had with the litigant, Ball. As one of two corporate officers, Ball signed the St. Joe Paper Company lease on behalf of the Company. And it is not shown to be a fact that he ever even knew of either of the two mortgage loans made by the two banks.

Before taking up the legal aspects of the facts above summarized, it is necessary to point out a number of Petitioner's other inaccuracies:

(1) At page 5 of Petitioner's brief he refers to St. Joe Paper Company as "Respondent's corporation", i.e., Ball's corporation. That is flatly contradictory

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[21] Justice Adams' acknowledgment on this mortgage was taken by the Clerk of the Supreme Court.

[22] Without disclosing the source of the alleged information or the basis of the alleged belief, the affiant avers, "on information and belief" (R. 834) that loans by said banks of the size mentioned can be made only with Ball's approval. But it is not made to appear as a fact that Ball or the Directors of the Florida National Bank of Jacksonville ever knew of the existence of either of these mortgages.

[23] These mortgages were "more than triply secured". 29 So. 2d, text 737.

of Petitioner's Suggestion of Disqualification which states categorically that that corporation is "the chief operating company of the duPont Estate" (R. 834).

(2) At page 5 of Petitioner's brief he charged that Ball "*individually* and as trustee of the Alfred I. duPont Estate" controls The Florida National Bank of Jacksonville. Petitioner, nowhere in his "Suggestion" charges that Ball had any "individual" interest in The Florida National Bank of Jacksonville or the Florida Bank at Fort Pierce or in the St. Joe Paper Company. On the contrary, both the Suggestion (R. 833) and the Petition (p. 11) charge that these banks are owned and controlled by the duPont Estate.

(3) At pages 5 and 11 of the Petition and Brief, Petitioner characterized the relationship between Justice Buford and St. Joe Paper Company under the oil lease, as "profit-sharers". The lease (R. 880-887) clearly indicates otherwise; it is a typical lease calling for annual rentals.[24]

(4) At page 12 of his Brief, Petitioner asserts: "There is no doubt that both Justice Buford and Justice Adams were heavily obligated to Respondent Ball and his associates". Again at page 14 of his Brief Petitioner reiterates his misstatement thus: "The participation of judges who were under financial obligation to litigant denied Petitioner due process of law and equal protection of the laws". The statement quoted first above and the innuendo of the second quoted statement are both unwarranted. The record nowhere

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[24] The Florida Supreme Court in its opinion overruling the Suggestion of Disqualification declared that "there was no joint or mutual interest" under the lease. (29 So. 2d text 734).

shows that either of the Justices was ever under any financial obligation to the Respondent, Ball:

(a) The oil lease from St. Joe Paper Company (R. 904-938), a duPont corporation, (R. 834) to Justice Buford involved no obligation to Ball, not even an indirect obligation.

(b) The mortgage loan made by Justice Adams with The Florida National Bank of Jacksonville, another duPont corporation (R. 833), was not only "triply secured" but paid off nearly a year before this case was submitted to the Florida Supreme Court on oral argument. That involved no obligation to Ball of any kind.

(c) The Mortgage loan made by Justice Adams with The Florida Bank at Fort Pierce, another duPont corporation (R. 833) also "triply secured", likewise involved no obligation to Ball in any way.

And so the truth of the matter is that nowhere is it shown that either of the Justices has ever been under obligation to Ball, financial or otherwise. The minor premise of Petitioner's argument is, therefore, a false premise.

(5) At pages 16-19 of his brief, Petitioner argues that "the conduct of the Florida Supreme Court in this case demonstrates that his fears as to the disinterestedness of the tribunal were justified". There is a fundamental fallacy in his conclusion. He cites the *first* decision of the case by the Court in October, 1937 (132 Fla. 132, 181 So. 341). He then cites the

third decision in November, 1946 (29 2d, 729). Then he compares the holdings of the two decisions in parallel columns, (Bf. pp. 17-18). But there are three vital factors significantly omitted by Petitioner, and these demonstrate the fallacy of his conclusion:

(a) He omits to mention that the holdings quoted from the two opinions, and contrasted, are *not* based upon the same evidence. He would have this Court understand that the Florida Supreme Court changed its views because of supposed bias on the part of Justices Buford and Adams, whereas the truth is that the evidence on the first trial of the case had completely changed.[25]

(b) He challenges Justice Buford's disinterestedness because of the St. Joe Paper Company 1944 oil lease, but omits to state that Justice Buford's views have remained constant throughout the entire litigation. Justice Buford dissented on the first decision in 1937 (132 Fla. 132, 181 So. 341) when it was held, four to two, that plaintiff's evidence standing alone made a prima facie case. He maintained the very same view on the second decision in 1940 (145 Fla. 537, 200 So. 692) when the court's decision (holding that the complete evidence was legally insufficient to prove a case) was unanimous. And it is to be noted that *both* of these decisions were rendered years before the St. Joe Paper Company lease to Buford. Justice Buford maintained the same view on the third decision in 1946, and now it is Petitioner's conclusion,

[25] Because the evidence had completely changed, there was no departure from the doctrine of the law of the case. Petitioner is in error in charging (Pet. p. 4 and 5 and Bf. p. 17) that the Florida Supreme Court "inexplicably" repudiated the law of the case. See Justice Barns' observations, 29 So. 2d, text p. 733, 738.

by fallacious post hoc propter hoc logic, that bias must have affected the third of his three identical decisions.

(c) Petitioner also omits to mention that on the second (the intermediate decision in the case) the Florida Supreme Court *unanimously* held that the complete evidence in the case was legally insufficient to support a verdict for Plaintiff. That unanimous decision of the Florida Supreme Court was rendered years before the occurrences now supposed to disqualify Justices Buford and Adams. And the third decision (the one now sought to be reviewed) merely reaffirms the former unanimous decision in detail, adding only that the former decision was "the law of the case", and that the alleged oral guaranty is in contravention of the Florida Statute of Frauds. (29 So. 2d, 729.)

It is, therefore, not true that "the conduct of the Florida Supreme Court in this case" indicates that its last decision was affected by bias. On the contrary, the only sound conclusion which can be drawn from "the conduct of the Florida Supreme Court in this case" is that the plaintiff had irretrievably lost his case on the second appeal in 1940 (when the Florida Supreme Court unanimously held that the complete evidence failed to make a case, 145 Fla. 537, 200 So. 692). And that decision (re-affirmed on the third appeal) was rendered years before the occurrences now supposed to disqualify two of the seven Justices.

A. The Record Discloses No Bias and the Justices Were Not Disqualified.

Petitioner (Bf. p. 15) concedes (a) that there is no corruption involved, (b) the honesty of the two Justices, and (c) "their desire to mete even-handed justice" (Bf. p. 15). Nor does the Petitioner suggest

that either of the two Justices has or had any interest of any kind in the outcome of the suit. The sole ground with which we are concerned as to the attempted disqualification of the two Justices is bias and prejudice.[24]

Stripped of its unwarranted innuendos [25] the Petition plainly shows on its face that neither Justice Buford nor Justice Adams was disqualified and that the Florida Supreme Court could have reached no other conclusion upon that question than the one that it did reach.[26]

We now summarize briefly all the pertinent facts alleged.

As to Justice Buford

The oil lease (R. 880) between St. Joe Paper Company and Justice Buford in 1944 was made:

(a) more than 3 years after the second reversal and remanding of this case by the Florida Supreme Court on the second appeal, and

(b) when the case was pending in the Circuit Court, and more than a year before its last trial, and

(c) it has been of public record since 1944, (R. 887).

Under the terms of the lease there was no joint or mutual interest, between the Paper Company and Jus-

[24] The Supreme Court of Florida so found, (29 So. 2d text 734).

[25] Facts, not baseless conclusions, must be shown to warrant the disqualification of a judge for bias and prejudice. *Beland vs. United States*, 117 Fed. (2d) 958 (CCA-5), 1941, certiorari denied 313 U. S. 585, 61 S. Ct. 1110, 85 L. Ed. 1541, Rehearing denied, 314 U. S. 708, 62 S. Ct. 54, 86 L. Ed. 1565.

[26] It is obvious that the "Suggestion" is insufficient on its face. However, since the Petition and Supporting Brief (pp. 5, 12) rely upon the statements filed by the two Justices, (29 So. 2d 735-737) we shall make reference to them in this sub-topic for the purpose of clarification.

tice Buford. The lessee was to pay and the lessor was to receive, and their interest was adverse and not joint, (29 So. 2d text 734).

The Petition has nowhere charged it to be a fact:

(a) that the terms of the lease were not the current going terms or that Justice Buford has not promptly complied with them,[27] or

(b) that Ball has any individual financial interest in the St. Joe Paper Company, directly or indirectly.

As to Justice Adams

The $80,000.00 mortgage of Justice Adams to the Florida National Bank of Jacksonville made June 29, 1945:

(a) was secured by more than 20,000 acres of land, 200 head of Hereford cattle and a large amount of automotive and farm equipment (R. 887-893), and

(b) it bore interest at the rate of 4% per annum which this Court judicially knows was at least the current rate on mortgage loans at that time, and it was promptly recorded July 3, 1945,

(c) it was made while a motion for a new trial of the case was pending in the Circuit Court and more than 2 months before the motion was denied, and

(d) it was paid off and satisfied of record, January 10, 1946, (R. 843) approximately 10 months before the

[27] The statement filed by Justice Buford shows that a well was drilled by an oil company and was abandoned in November, 1944, as a "dry hole" more than a year before the case was tried in the State Circuit Court, and all but a small portion of the lands were released and abandoned by Justice Buford so that the aggregate rentals payable (and paid) by him after the abandonment of the "dry hole" in November, 1944, amounted in the aggregate to less than $800, (29 So. 2d text 736).

case was argued and submitted to the Florida Supreme Court.

The $30,000.00 mortgage of Justice Adams and Irlo Bronson to the Florida Bank at Fort Pierce made December 4, 1946:

(a) was secured by 3 parcels of improved property, the buildings upon which were required by the mortgage to be insured for not less than $30,000.00 (the full amount of the mortgage), (R. 900).[28] It was made after the Florida Supreme Court's decision was rendered.

(b) it was acknowledged by Justice Adams before the Clerk of the Supreme Court and has been a matter of public record since December 10, 1946. (R. 844-901).

(c) it bears interest at the rate of 4% per annum, which this Court judicially knows was at least the current rate on mortgage loans at the time the mortgage was made.

The Petition has nowhere charged it to be a fact:

(a) that the mortgages were not both amply secured[29] and appropriate loans for national and state banks to make and hold,[30] or

(b) that Ball has any individual financial interest

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[28] If Petitioner had chosen to do so, he could have informed this Court what everyone in Florida knows (or could ascertain upon slight inquiry), i. e., the personal financial status of both Justice Adams and Irlo Bronson.

[29] Justice Adams in his statement filed with the Florida Supreme Court declared that both mortgages were "more than triply secured", (29 So. 2d text 737).

[30] This court will take judicial notice that since the debacle of the 1930's both national and state laws and regulations prescribe rigid requirements with respect to the terms, security and soundness of mortgage loans made by national and state banks.

in or control of the Florida National Bank of Jacksonville or the Florida Bank at Fort Pierce, directly or indirectly,[31] or

(c) that Ball was an officer or director of the Florida Bank at Fort Pierce or an officer of the Florida National Bank of Jacksonville, or that Ball or his Counsel knew of the existence of the mortgage loans.

As to Both Justice Buford and Justice Adams

The Petition has nowhere charged:

(a) that Ball has any individual or financial interest directly or indirectly in the duPont trust assets, or income;

(b) what the powers and duties are, of the four trustees of the duPont Estate. By what means or authority Ball is the "dominant trustee" and "dominates" and controls the trust and the other three trustees,[32] who must be presumed to have equal power with Ball, under the duPont Will, until the Will is produced, and *facts* asserted, to show the contrary.

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[31] The Petition, page 5, asserts that Respondent "individually and as trustee" of the Alfred I. duPont Estate controlled the Florida National Bank of Jacksonville. Doubtless this misstatement is unwittingly made. For nowhere in his "Suggestion" or in the record does Petitioner assert that Ball has any individual or personal or financial interest in the Florida National Bank of Jacksonville or the Florida Bank at Fort Pierce. On the contrary both the "Suggestion" (R. 833) and the Petition (p. 11) assert that all of the banking institutions referred to in the Suggestion and Petition are owned and controlled by the duPont Estate. This Court judicially knows that by Federal law, Ball, to be a director, is required to hold qualifying shares of stock in the Florida National Bank of Jacksonville. But the Petition does not charge even this.

[32] Petitioner offers no excuse for failure to produce a copy of the duPont Will so that this Court might form its own opinion as to the relative powers of the four trustees. This Court judicially knows that under Florida law the Will is of probate and record. (Sec. 732.26 Fla. Stat. 1941).

Except for the concurrence by Justices Buford and Adams in the decision upon the merits, rendered against Petitioner upon the last appeal (sufficiently discussed, ante pp. 25-27), the making of the oil lease and the two mortgages are the only facts asserted in the Petition, or in the brief in support of it, to disqualify Justice Buford and Justice Adams, who, for more than twenty years and more than six years respectively, have sat with distinction upon the highest Court of their State.

It is obvious that the Petition does not show that either of the Justices was indebted to Ball, but if either or both of them had been indebted to Ball, such indebtedness would not have disqualified them unless they themselves considered it did so. (*State ex rel. Tunnicliffe v. Koonce*, 100 Fla. 94, 129 So. 340).[33]

The truth is that the facts alleged in the Petition to show bias and prejudice do not rise to the height

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[33] In the Tunnicliffe case, a Circuit Judge was indebted (the amount not stated) to an insolvent bank which had been taken over by a liquidator under state law. The judge disqualified himself in a pending cause between the liquidator and a debtor of the bank, upon the ground that he then was a debtor of the bank being liquidated and had a pecuniary interest. The judge of another Circuit was substituted. On mandamus the Florida Supreme Court required the debtor Judge to take jurisdiction. It distinguished that case from those involving probate courts and other administrative functionaries. It held that the debtor judge was not a party and had no pecuniary interest in the result of the suit, that he was not ipso facto disqualified by reason of the debtor-creditor relationship. Therefore, in the absence of some statement (in his Certificate) *to show that by reason of that relationship, he was in fact biased or prejudiced*, he was not disqualified and must proceed with the case. Also that the substitute judge was without jurisdiction. See also: *Ash v. Barnsdall Oil Co.*, 118 F. 2d 699, (CCA-5), (1941), Certiorari denied, 314 U.S. 643, 86 L. Ed. 516, 62 Sup. Ct. Rep., 83; *Moses v. Julian*, 45 N. H. 52, (1863); *Moody v. Shuffleton*,—Cal. App.—, 257 Pac. 564, (1927); *Conklin v. Crosby*, 29 Ariz. 60, 239 Pac. 506, (1925); *Johnston v. Dakan*, 9 Cal. App. 522, 99 Pac. 729.

of "party contacts" as the Petition by innuendo would have this Court infer.

For the "contacts" are thrice removed. The Petition shows:

(1) that Ball is one of the four trustees of the duPont Estate and he is not shown to have any personal interest therein;

(2) that it is the duPont Estate and not Ball which owns and controls the paper company and the two banks which held the oil lease and the mortgages; and

(3) that it is Ball individually who is party to the suit, and not the paper company and the banks.

This is too remote to constitute "party contact" between Ball and the two Justices.

And not even all proximate party contacts are grounds for disqualification or voluntary recusation. Justices of this Court have not hesitated to sit in cases involving their former clients, or clients of their former law firms, in instances where the Justice himself did not consider that he was disqualified.[34]

Since Justice Buford and Justice Adams were competent to continue in the cause and were not legally disqualified, it was their "duty to exercise judicial functions therein, * * * regardless of personal embarrassment or other considerations" *State ex rel. Palmer v. Atkinson*, 116 Fla. 366, 156 So. 726; *Trustees Internal Improvement Fund v. Bailey*, 10 Fla. 213.

Each had already exercised his judicial function and heard and taken part in the decision of the case.

[34] Yale Law Journal, Vol. 56, No. 4, 605 pp. 612, 622, 623, 625.

Voluntary recusation at that stage of the proceedings manifestly would have been an abandonment of their judicial duty which they were sworn to perform. And under the circumstances, Circuit Judges designated to sit in their places upon the Petition for Rehearing would have been without jurisdiction.[35] (*Trustees v. Bailey*, 10 Fla. 213.) (See also: *State ex rel. Tunnicliffe v. Koonce*, 100 Fla. 94, 129 So. 340.) Voluntary recusation by either Justice Buford or Justice Adams under the circumstances would have violated all concepts of judicial duty and the orderly administration of the law.

As Mr. Chief Justice Taft pointed out, matters of kinship, *personal bias*, * * * remoteness of interest, (a species of party contact), seem generally to be matters of state law. (*Tumey v. Ohio*, 277 U. S. 510, 71 L. Ed. 749.)

From the earliest times, the Justices of this Court have exercised the prerogative of deciding for themselves whether they are disqualified for bias or prejudice. We have found no decision of this Court where that same prerogative has been denied to a Justice of the highest Court of a State when his qualifications were called in question on those grounds. It is strange indeed that the established practice of the Justices of

[35] Our view is that Section 4(b), Article 5 of the Florida Constitution, contemplates that no more than one Circuit Judge can be called in to sit on the Supreme Court when that Court is sitting *en banc*. Circuit Judge Barns who wrote the opinion of the Florida Supreme Court on the last appeal (29 So. 2d 729) reversing the judgment of the Circuit Court, sat in the place of Justice Sebring who was then in Nuremberg, Germany, and was disqualified because of former connection with the case. So as we view it, there was no constitutional power to call in two more Circuit Judges. The Constitutional provisions cited above (Appendix A) have been but lately adopted (1940) and there has been but one apposite case upon the subject, *State v. Lee*, 127 Fla. 802, 174 So. 19. There, all justices of the Court were not disqualified because no method was prescribed for calling substitutes for all of the Justices.

the Supreme Court of the United States should be thought by Petitioner to be subject to question when exercised by state supreme court justices.

B. The Decision of the Florida Supreme Court Adjudging That Justices Buford and Adams Were Not Disqualified for Bias Should Be Conclusive.

Petitioner's Supplemental Petition for Rehearing and Suggestion of Disqualification, (R. 831-902) was addressed to the whole Court (R. 831). It moved that Justices Buford and Adams either "recuse themselves or in the alternative that they be disqualified to participate in these proceedings". Justices Buford and Adams each filed a statement relating to the facts alleged. Each announced that he was "conscious of no bias or prejudice" for or against either party to the litigation, resulting from the matters suggested "or otherwise", (R. 904, 940, 29 So. 2d, text 735, 737) and each asked the whole Court to pass on the Suggestion.[36] The remaining five Justices sitting en banc (Buford and Adams not participating) and constituting a quorum under Art. V, Sec. 4 (a) of the Florida Constitution, proceeded to examine the Florida Statutes relating to disqualification of Judges.[37] The Court held that the Suggestion of Disqualification was upon the ground of prejudice and bias. (29 So. 2d text 734). The decision then analyzed and considered the sufficiency of the petition to show disqualification in the light of the Statute under which the Petitioner undertook to proceed.

[36] In State ex rel. Tunnicliffe v. Koonce, 100 Fla. 94, 129 So. 340, it was held that unless facts (not necessarily resulting in bias) actually engendered conscious bias in the mind of the judge, he was not disqualified.

[37] Secs. 38.01 to 38.10 inclusive, Florida Statutes 1941.

The unanimous decision of the Court was that Petitioner's Suggestion was insufficient in substance to disqualify Justices Buford and Adams.[38] The Court further observed that voluntary recusation was not a matter for the Court to decide but rather a matter for each individual Justice to determine.[39] Justices Buford and Adams, having declined to recuse themselves (Pet. p. 6) did not, however, stand on their own determination of the matter. Rather they submitted the question to the whole Court. The Court, following the practice observed in *Trustees v. Bailey*, 10 Fla. 213, decided the question, and held the two Justices not disqualified.[40]

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[38] In this unanimous decision five Justices concurred. Two of the concurring Justices had dissented in the original five-to-two decision against Petitioner on the merits of the case.

[39] In Vol. 56, No. 4 Yale Law Journal, p. 612, it is noted that "in the United States Supreme Court, disqualification has always been the prerogative of each individual Justice", and further at p. 625, that "the Supreme Court is less inclined to disqualification than some of the state courts".

[40] The case at bar was the first time that an attempt has been made to disqualify a Florida Supreme Court Justice for bias since the enactment of Sec. 38.10 in 1919. It had been invoked and considered frequently with respect to Circuit Judges. The Florida decisions uniformly hold that when an attempt is made to disqualify a Circuit Judge for bias or prejudice under the Statute he must examine the statements of fact contained in the affidavit in support of bias or prejudice, and if such statements of fact are insufficient to show bias or prejudice, of the Judge, he must deny the application, because a trial judge can no more disqualify himself under the statutes where the facts asserted do not justify it, than he can refuse to do so when such facts require it. *Theo. Hirsch Co. v. McDonald Furniture Co.*, (1927) 94 Fla. 185, 114 So. 517; *City of Palatka v. Frederick*, (1927) 128 Fla. 366, 174 So. 826.

Sec. 38.10 Fla. Stat. 1941, is the only Florida Statute relating to the disqualification of judges for bias or prejudice. It is substantially the same as the Federal Statute (28 U.S.C.A. 25), so the Florida Supreme Court says. *Theo. Hirsch Co. v. McDonald Furniture Co.*, 94 Fla. 185, text 191, 114 So. 517. The Federal Statute has been uniformly held to be inapplicable to appellate judges. *Kinney v. Plymouth Rock Squab Co.*, 213 Fed. 449 (C.C.A. 1, 1913); *Millslagle v. Olsen*, 128 Fed. 2d, 1015 (C.C.A. 8, 1942).

The decision of the Florida Supreme Court holding Justices Buford and Adams not disqualified for bias was eminently correct, as has been shown above. Moreover, this Court, in considering the effect of the Florida decision, should accord to the Florida Supreme Court the equal right, to construe affidavits strictly, when judges are challenged for personal bias, which this Court accords to the inferior Federal Courts. See *Beland v. United States*, 117 Fed. 2d, 958 (C.C.A. 5); cert. den. 313 U. S. 585, 85 L. Ed. 1541; rehearing denied 314 U. S. 708, 86 L. Ed. 1565.

The question involved in the case at bar, being merely one of asserted unconscious bias and *not* involving (i) bribery or (ii) dishonesty or (iii) an interest in the subject matter of the suit, Pet. (Bf. p. 15) was one peculiarly appropriate for consideration and decision by the Florida Supreme Court, and one upon which its decision should be final and conclusive. *Jordan v. Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038.

In the *Jordan* case, the plaintiff in error had been convicted of murder. Upon motion for new trial the disqualification of one of the jurors (necessary to conviction) was urged because of insanity. Upon a hearing, the Massachusetts court found "by a fair preponderance of all the evidence" that the juror was qualified. Upon writ of error, it was held by this Court that the qualification of the juror having been judicially determined by the Massachusetts courts (although upon disputed evidence), that determination was final and conclusive, being a matter peculiarly within the province of the state courts for decision.

In the case at bar (in addition to the determination

by the two Justices themselves that no ground existed for them to recuse themselves) Petitioner has also had a judicial determination by the unanimous decision of a constitutional quorum of the Florida Supreme Court, holding the two Justices not disqualified.

Under the Jordan case, this decision by the state court should be conclusive of the question, and this Court should not take jurisdiction.

C. The Suggestion of Disqualification Came Too Late.

Petitioner's alleged bases of disqualification are: (i) That in 1944 Justice Buford had taken an oil lease from St. Joe Paper Co., a corporation owned and controlled by the duPont Estate; and (ii) that in 1945 Justice Adams had borrowed money on a mortgage from Florida National Bank of Jacksonville, another duPont corporation (paid off and satisfied in January, 1946); and that after the decision of this case, Justice Adams had borrowed money on a mortgage from Florida Bank at Ft. Pierce, also a duPont corporation; and that, accordingly, the Justices might be biased in favor of Respondent, Ball, one of the four trustees of the duPont estate, which owned those corporations.

These instruments were all of public record from the time of their execution. The case at bar was orally argued in the Florida Supreme Court early in November, 1946, and decided November 29, 1946. It was not until January 4th, 1947, that Petitioner instituted a search of the public records (R. 902), and not until

February 1, 1947, that the suggestion of disqualification was submitted.

Both the search of the records and the filing of the suggestion came not only *after* the decision of the case by the Florida Supreme Court, but also *after* the filing of the petition for rehearing.

Petitioner seeks to excuse the fact that his suggestion of disqualification was submitted at that late date by the simple statement (Pet. p. 5; Bf. p. 13) that the recorded instruments "were not discovered until after the decision." The record shows (R. 902) that Petitioner didn't even *start to look* for them until more than a month *after* the decision had gone against him, and *after* the filing of a petition for rehearing.

Petitioner does not reveal just what spurred him into action in January, 1947, (when he instituted a search of the public records) nor why he did not do that very thing before submitting the case to the Supreme Court in November, 1946. But the fact remains that his delay until January, 1947, (whether excusable or not) did afford him the chance that the two Justices, who are now questioned, might hold with him on the merits of his case. Petitioner waited (whether negligently or intentionally, it does not matter) until after the two Justices had concurred with three other Justices in a five-to-two decision against him. Then, and only then, did he institute his inquiry.

That was too late.

If this were a case involving bribery or lack of honesty or a case involving a personal interest of a

judge in the subject matter of the suit, the judgment might be attacked for fraud *at any time* upon discovery of the facts. But admittedly this is not that sort of a case. The only question here is one of asserted unconscious bias resulting, so Petitioner claims, from legitimate contracts publicly recorded, one a lease between Buford and St. Joe Paper Co. and the other two mortgage loans by Adams from the two banks. He closed his eyes to same while he speculated on the outcome of the case, and only after he had lost, did he begin to look for something to support a charge of bias.

In its opinion holding that Justices Buford and Adams were not disqualified for bias, the Florida Supreme Court comments on this delay. *Ball v. Yates*, 29 So. 2d, text pp. 733-735.

A similar situation was involved in *Voltman v. United Fruit Co.*, 147 Fed. 2d, 514, where attempted disqualification for bias was raised after the trial of the case had been under way for some days. The Second Circuit Court of Appeals denied it, as coming too late.

And in *Millslagle v. Olson*, 128 Fed. 2d, 1015, the Circuit Court of Appeals of the Eighth Circuit dismissed an affidavit of disqualification of the Judges of the Circuit Court of Appeals made upon petition for rehearing. Among other things the Court held that the affidavit was "not filed on time." That is the very situation in the case at bar.

Bias is not a common law ground of disqualification. (Yale Law Journal, Vol. 56, No. 4, p. 605). Un-

less largely discretionary, it is statutory. The Florida statute (Sec. 38.10 Fla. Stats. 1941) like the Federal statute (28 U.S.C. 24-5) requires it to be raised *before* a case is submitted. Judges invariably decline to sit in a case if a question of possible bias is suggested in advance. But after a decision has been rendered, such a challenge comes too late.

The case at bar was submitted without objection to the seven Justices sitting. Their decision was against Petitioner, five to two. One of the five Justices who held against Petitioner was Justice Brown. Justice Brown retired from the Court shortly after the decision. Had the suggestion of disqualification been interposed before the case was submitted to the Court, respondent would have had the benefit of Justice Brown's decision. That is no longer available.

The challenge of Justices Buford and Adams for bias, supposed to result from legitimate contracts with corporations owned by the duPont estate coming after the Court's decision, is (i) unfair to the Court; (ii) unfair to the two Justices; and (iii) unfair to Respondent's counsel.

This Court should not take jurisdiction to disturb the Florida Supreme Court's decision.

D. The Decision of the Florida Supreme Court Is A Valid Judgment.

The decision sought to be reviewed here (*Ball v. Yates*, 29 So. 2d 729) was rendered in a case heard by the entire Court "as a single body". All seven Justices heard the case. The decision against Petitioner

was concurred in by five Justices; two Justices dissented.

Thereafter, Petitioner sought to disqualify two of the five Justices holding against him. As shown in sub-section A (pp. 27-35 ante) the two Justices were not disqualified. And as shown in sub-section B (pp. 35-38 ante) the Florida Supreme Court unanimously held the two Justices not to be disqualified. And as shown in sub-section C (pp. 38-41 ante) the suggestion of disqualification came too late.

However, assuming, for the sake of the argument, that the two Justices might be considered disqualified, still the decision went against Petitioner, by a three to two decision of a constitutional quorum of the Florida Supreme Court.[41] Such a decision is due process of law.

Moreover, such a decision has been held by the Florida Supreme Court to constitute a valid Florida Supreme Court decision. *Caples v. Taliaferro*, 146 Fla. 122, (text p. 131) 200 So. 378.

In the *Caples* case there had been two consolidated appeals in companion cases. The judgments of the lower court were reversed. The decision was four to two for reversal. One of the four Justices who concurred in the reversal was disqualified; he had formerly participated in the matter as State Attorney General.

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[41] The Florida Constitution (Sec. 4 (a), Art. V) provides:

"The Supreme Court may hear, consider and determine cases and exercise all its powers and jurisdiction as a single body in which case a majority of the members of the Court shall constitute a quorum for the dispatch of business; or it may exercise its powers and jurisdiction in divisions."

Upon this being noted, a rehearing was ordered and a Circuit Judge took his place.

Upon reargument, the six Justices stood three to three, and the original decision was adhered to (with certain modification not relevant here). Appellee moved to vacate the judgment on the ground that the original four to two judgment of reversal was *void* because of the participation of a disqualified Justice and the further ground that since the final count stood three to three, there must be an affirmance under the settled Florida appellate practice.

This motion was denied by a *unanimous* decision holding that the original decision was a valid decision and that because there was not a majority vote to overturn it, it must stand. The Court said:

> "Three qualified Justices voted to reaffirm both appellate decrees as rendered, while only two Justices dissented. The mere fact that a technically disqualified Justice inadvertently joined in the opinions with three qualified Justices could not destroy the validity of the appellate decrees as rendered, when three qualified Justices voted to reverse the decrees while only two Justices dissented."

In the case at bar we have the same situation. The decision sought to be reviewed was by a five to two majority against Petitioner. Assuming for the sake of the argument that two of the majority might be considered disqualified, that still left a valid decision against Petitioner by a three to two vote of a constitutional quorum of the court.

A valid state court judgment by five qualified Justices of a state Supreme Court can hardly be deemed to be a denial of due process, and this Court should not take jurisdiction to disturb same.

E. The Judgment of the Florida Supreme Court Does Not Deny Petitioner Due Process of Law.

It is charged in the Petition for Certiorari and Supporting Brief that the participation of Justices Buford and Adams in the decision of this case by the Florida Supreme Court, denies Petitioner due process of law in contravention of the 14th Amendment.[42]

The many inaccuracies of the petition and supporting brief are catalogued (ante, pp. 23-27). In subpoint A, it is shown that the averments of the Suggestion of Disqualification disclose no bias of the Justices which would constitute a disqualification (ante, pp. 27-35). A constitutional quorum of the Florida Supreme Court (*excluding* Justices Buford and Adams) decided unanimously that the two Justices were not disqualified for bias, (ante, pp. 35-38). This decision is on a point peculiarly within the province of state courts. The decision of the Florida Supreme Court is a valid judgment under Florida law, and, being a three to two decision against Petitioner, is not a denial of due process, (ante, pp. 41-43).

The only question here is whether the facts charged in the Suggestion transcend the unanimous decision

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[42] No question of "equal protection of the laws" is involved in this case.

of the Florida Supreme Court (that no sufficient bias was shown to amount to disqualification) and amount to the denial of due process under the Federal Constitution.

It is our view that the showing made by Petitioner in his Suggestion of Disqualification (R. 831) does not involve one of "those very exceptional circumstances that this Court would feel justified in saying that there had been a failure of due legal process" (as this Court put it in *Jordan v. Massachusetts*, 225 U. S. text p. 174).

No charge is made that either of the Justices had any personal interest in the outcome of the controversy between the Petitioner, Yates, and Respondent, Ball. It is expressly conceded by Petitioner (Bf. p. 15) that this case does not involve corruption and that the Justices were "honest" and consciously "desired to mete even-handed justice." The maximum of Petitioner's charge is that the two Justices were unconsciously biased in favor of Ball and against Yates because St. Joe Paper Company had executed an oil lease to Buford in 1944 at the going rate and the two banks had made legitimate mortgage loans to Adams, the lessor and mortgagees being owned and controlled by the duPont Estate, of which estate Ball was one of the four trustees.[43]

These facts, insofar as they might be considered to show bias, do not involve constitutional invalidity. This is clear from this Court's opinion in *Tumey v. Ohio*, 273 U. S. 510, 71 L. Ed. 749, a case involving

[43] The detailed nature of these transactions is set forth ante, pp. 28-33.

a personal pecuniary interest of the trial judge in the subject matter of the cause. The opinion in the *Tumey* case clearly draws the distinction, thus:

> "All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion. Wheeling v. Black, 25 W. Va. 266, 270. But it certainly violates the 14th Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case."

And in *Jordan v. Massachusetts*, 225 U. S. 167, 56 L. Ed. 1038, this Court held that a determination by the Massachusetts courts of the qualification of a juror (whose vote was essential to conviction for murder) upon a mere preponderance of the evidence, did not deprive the defendant of due process, the matter being one peculiarly for determination by the state court.

In the case at bar, the Florida Supreme Court has likewise determined the qualification of Justices Buford and Adams. *Ball v. Yates*, 29 So. 2d., text 733-735. This was a unanimous decision by a constitutional quorum of five Justices. That should settle the question.

The principles enunciated in the *Tumey* case and the *Jordan* case were reiterated with approval in *N. L. R. B. v. Baldwin L. Works*, 128 Fed. 2d, 39, text

45, footnote 9, and have been followed in three states, where it has been held that bias which might be presumed from "party contacts" of a Judge does not involve denial of due process under the 14th Amendment.

M. K. & T. Ry. Co. of Texas v. Mitcham, 57 Tex. Civ. App. 134, 121 S. W. 871;

Ison v. Western Vegetable Distributors, 48 Ariz. 104, 59 Pac. 2d, 649;

Brents v. Burnett, 295 Ky. 337, 174 S. W. 2d, 521.

It is, therefore, respectfully urged that the decision of the Florida Supreme Court (29 So. 2d, 733-735) holding that the two Justices were not disqualified for bias is conclusive of the matter under this Court's decision in the *Jordan* case, and that, as this Court's opinion in the *Tumey* case points out, "personal bias" and "remoteness of interest" do not involve constitutional invalidity. Accordingly, this Court should not take jurisdiction.

CONCLUSION

It is therefore, respectfully urged that the petition for writ of certiorari should be denied (i) for want of a final judgment, and (ii) for want of a substantial federal question.

Respectfully submitted,

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APPENDIX "A"

Article 5, Section 4 (a) and (b) of the Constitution of the State of Florida:

Section 4. *Supreme Court; quorum; divisions.*— (a) The Supreme Court may hear, consider and determine cases and exercise all its powers and jurisdiction as a single body in which case a majority of the members of the court shall constitute a quorum for the dispatch of business; or it may exercise its powers and jurisdiction in divisions.

(b) The Circuit Judges shall at all times be subject to call to the Supreme Court by that Court or the Chief Justice thereof, and during the call shall be members thereof as associate justices to act in place of any absent, disqualified or disabled justice or for assignment to a division, but no division shall include more than one circuit judge. A division shall consist of three members of said Court, exclusive of the Chief Justice, and the judgment of a division concurred in by the Chief Justice shall be the judgment of the Court unless such case involves (1) capital punishment, or (2) the determination of a State or Federal constitutional question wherein shall be brought into controversy the constitutionality of a Federal or State Statute, rule, regulation or municipal ordinance, or (3) there be a dissent to the proposed judgment of a division by a member thereof or the Chief Justice, or (4) ordered by the Chief Justice to be considered by two divisions; whereupon it shall require the consideration of two divisions and the Chief Justice.